MALAYSIAN REPORTS

Malaysian Bar v Tan Sri Dato Abdul Hamid bin Omar

SUPREME COURT (KUALA LUMPUR) – CIVIL APPLICATION NO 08-21-89
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF AND GUNN CHIT TUAN SCJJ
28 AND 29 APRIL 1989

Civil Procedure – Alleged contempt of court – Allegation that respondent attempted to prevent, frustrate and interfere with the sitting of the Supreme Court of Malaysia – Locus standi of applicant – Sitting of Supreme Court on date alleged illegal – Respondent entitled to prevent unauthorized sitting of Supreme Court – Inordinate delay in making application – Rules of the High Court 1980, O 52 r 2(2) – Rules of the Supreme Court 1980, r 4 – Courts of Judicature Act 1964, ss 38 & 39

The applicant applied for an order for the committal to prison of the respondent for alleged contempt of court where it was alleged that the respondent attempted to prevent, frustrate and interfere with the sitting of the Supreme Court. The particulars of the alleged acts said to constitute the contempt were as follows:

(a) on 2 July 1988, the respondent being a party to Kuala Lumpur High Court Originating Motion No R8-21-79-88 and anticipating an appeal or application by the opposite party in the said proceedings to the Supreme Court instructed the staff of the Registry of the Supreme Court that in the event of such appeal or application being filed no action should be taken without directions from the respondent;
(b) subsequently, on learning that an application as anticipated was actually filed, the respondent gave instructions to the Chief Registrar of the Supreme Court that the court rooms should be kept closed, that the staff should not assist in such sitting, that neither the Chief Registrar nor any other senior registrar was to sign any order that might be made and that the court seal should not be made available.

Held, dismissing the application:

(1) It is questionable whether the applicant has locus standi but even assuming that the applicant has locus standi having regard to the facts set out in the statement, affidavit and report of the tribunal annexed to the affidavit, this was not a proper case where leave should be granted.

(2) There was no lawful sitting of the Supreme Court on 2 July 1988 and it may even be argued that the respondent was perfectly entitled to prevent an unauthorized sitting of the Supreme Court in contravention of ss 38 and 39 of the Courts of Judicature Act.

(3) The facts set out in the affidavit on behalf of the applicant and the report of the tribunal would also seem to contradict the allegations contained in the grounds and lead to the conclusion that the instructions, even if issued, were never implemented.

(4) There has been an inordinate delay in making the application. A lapse of nine months unexplained in the affidavit is not reasonable.

Cases referred to

1 *Government of Malaysia* v *Lim Kit Siang* [1988] 2 MLJ 12 (folld)
2 *Boyce* v *Paddington Borough Council* [1903] 1 Ch 109 (folld)
3 *Gouriet* v *Union of Post Office Workers & Ors* [1978] AC 435; [1977] 3 All ER 70 (folld)
4 *Arthur Lee Meng Kwang* v *Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193 (refd)
5 *Raymond* v *Honey* [1982] 1 All ER 756 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 9(1), 38, 39
Legal Profession Act 1976 s 42(1)(a)
Rules of the High Court 1980 O 52 r 2(2)
Rules of the Supreme Court 1980 r 4

Raja Abdul Aziz Addruse (*S Theivanthiran*, *Lee Min Choon*, *Matthias Chaus*, *Gurbachan Singh Johal*, *Collin Sequerah* and *Jeffrey Fernandez* with him) for the applicant.

Tan Sri Abu Talib bin Othman, Attorney General, Malaysia (*T Selventhiranathan*, Senior Federal Counsel, with him) for the respondent.

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): In this proceeding the applicant, the Malaysian Bar, is seeking leave to apply for an order for the committal to prison of Tan Sri Dato Abdul Hamid bin Omar, the respondent, for alleged contempt of court committed on 2 July 1988 where it is alleged that the respondent attempted to prevent, frustrate and interfere with the sitting of the Supreme Court of Malaysia.

The background facts which resulted in the present proceeding are exhaustively set out in the report of the tribunal appointed by His Majesty the Yang di-Pertuan Agong under art 125(3) of the Federal Constitution, a copy of which was annexed to the affidavit of Manjeet Singh Dhillon, secretary of the Bar Council of the Malaysian Bar. For the purpose of this judgment the background facts may be briefly stated as follows. At the material time Tun Salleh was suspended as Lord President and was facing an enquiry before a tribunal appointed under art 125(3) of the Constitution. On 26 August 1988 Tun Salleh made an application to the High Court in Kuala Lumpur (Originating Motion No R8-32-79-88) for leave to apply for an order of prohibition against members of the tribunal of whom the respondent was one. That application was partly heard in the High Court before Mr Justice Dato Ajaib Singh who, on the morning of 1 July 1988, adjourned the matter to the afternoon; and in the afternoon adjourned it to 2 July 1988 for decision. When the matter came for decision on 2 July 1988 the learned judge in a written judgment decided to further adjourn the same to 4 July 1988 to enable the Attorney General to make submissions. The learned judge refused an oral application for a limited stay until 4 July 1988. Shortly thereafter leading counsel for Tun Salleh together with some other lawyers saw a Supreme Court judge, Tan Sri Wan Suleiman, and requested him to convene a special sitting of the Supreme Court to hear an application to preserve the status quo.

Supreme Court Judge Tan Sri Wan Suleiman, purporting to act under s 9(1) of the Courts of Judicature Act 1964, thereupon without the knowledge and consent of the respondent who was then Acting Lord President convened a special sitting of the Supreme Court consisting of five judges. The sitting commenced at about 12.50 pm and counsel for Tun Salleh made an oral application for stay. After a hearing which lasted for about 30 minutes and a short adjournment for deliberation, the five judges unanimously made an order for limited stay restraining the tribunal from submitting its report, recommendation and advice to His Majesty the Yang di-Pertuan Agong until further order.

In the present application for leave the particulars of the alleged acts said to constitute the contempt were set out in the statement pursuant to O 52 r 2(2) and Rules of the Supreme Court, r 4 appearing under 'grounds' as follows:

(a) on the 2nd day of July 1988, the respondent being a party to Kuala Lumpur High Court Originating Motion No R8-32-79-88 and anticipating an appeal or application by the opposite party in the said proceedings to the Supreme Court instructed the staff of the Registry of the Supreme Court that in the event of such appeal or application being filed no action should be taken without directions from the respondent;

(b) subsequently, on learing that an application as anticipated was actually filed, the respondent gave instructions to the Chief Registrar of the Supreme Court that the court rooms should be kept closed, that the staff should not assist in such sitting, that neither the Chief Registrar nor any other senior assistant registrar was to sign any order that might be made and that the court seal should not be made available.

One of the points raised before us in this proceeding is the locus standi of the applicant. In our view it is questionable whether the applicant has locus standi notwithstanding s 42(1)(a) of the Legal Profession Act which states that the purpose of the Malaysian Bar shall be 'to uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour.' It is only recently that this court had dealt with the law of locus standi that should be applied in this country and this is laid down in the majority judgment in *Government of Malaysia* v *Lim Kit Siang.*[1] Briefly the position as to the law of locus standi in this country is as follows:

(1) The principle to determine the locus standi of a party in a proceeding is as laid down in *Boyce* v *Paddington Borough Council*[2] as approved by the House of Lords in *Gouriet* v *Union of Post Office Workers & Ors.*[3]

(2) The rule as to locus standi applicable in Malaysia is that accepted in England before the enactment of O 53 of the English Rules of the Supreme Court. Since we have not accepted O 53 and its statutory underpinnings (ie s 31 of the Supreme Court Act) there is no justification to depart from the rule of locus standi accepted by the highest court in England prior to O 53.

Ours is a conservative approach to locus standi but that is the law as it stands now. Until a change is made in the law a plaintiff must first establish that he qualifies as a person entitled to be a party to the proceeding. In a proceeding for contempt the qualification of 'sufficient interest' in *Arthur Lee Meng Kwang* v *Faber Merlin Malaysia Bhd & Ors*[4] must be read together with the majority judgment in *Lim Kit Siang.*[1]

However, even assuming for a moment that the applicant has locus standi having regard to the facts set out in the statement, affidavit and the report of the tribunal annexed to the affidavit we do not consider this to be a proper case where leave should be granted. We say this for the following reasons.

The tribunal dealt with the sitting of the five Supreme Court judges on 2 July 1988 and after considering ss 38 and 39 of the Courts of Judicature Act came to a finding 'that the Supreme Court which sat on 2 July 1988 was convened in contravention of ss 38 and 39 of the Courts of Judicature Act' and in the result 'the court was not a lawfully constituted court and so has no jurisdiction to make the purported order for interim stay': see pp 6 to 9 of the report of the tribunal. Again at p 73 of the report the tribunal found that the sitting of the five judges was 'illegal and without jurisdiction'.

We have ourselves examined ss 38 and 39 of the Courts of Judicature Act and we have come to the same view, ie the sitting on 2 July 1988 was in contravention of ss 38 and 39 of the Courts of Judicature Act. In our view it is the Lord President alone or any person acting as Lord President who is entitled to convene and to empanel judges to constitute the Supreme Court for any sitting, whether scheduled or unscheduled. The powers of the Lord President or any person acting as Lord President under ss 38 and 39 of the Act are express statutory powers which cannot be exercised by others unless properly exercised under s 9(1) of the Act during illness or absence from Malaysia or owing to any other cause when the Lord President is unable to exercise the functions of his office. We read the words 'any other cause' in s 9(1) to relate to physical inability in the sense that the Lord President is unable to perform his functions.

There was thus no lawful sitting of the Supreme Court on 2 July 1988. So we have to ask the ultimate question – contempt of what? Indeed it may even be argued that the respondent was perfectly entitled to prevent an unauthorized sitting of the Supreme Court in contravention of ss 38 and 39 of the Courts of Judicature

Act. What amounts to contempt are acts done calculated to obstruct or interfere with the lawful process of the court. See also the speech of Lord Wilberforce in *Raymond* v *Honey*.[5]

The facts set out in the affidavit on behalf of the Malaysian Bar and the report of the tribunal would also seem to contradict the allegations contained in the grounds. The judges went into court at 12.50 pm which only means that the doors of the court were not closed. They sat for about half an hour assisted by the staff of the registry although the Chief Registrar was absent. After the hearing they granted an order which bore the seal of the Supreme Court which only means that the seal was made available and not denied from them. In our view all these would compel us to come to one conclusion only and, that is, the instructions even if issued were never implemented.

Finally there has certainly been an inordinate delay in making the application. The resolution of the Malaysian Bar to institute proceedings for contempt was passed on 19 July 1988. The application for leave was filed on 24 April 1989. There was no explanation for the delay in the affidavit of the secretary of the Bar. The allegation of contempt is a serious matter and should be pursued within a reasonable time. The delay must be explained. In our view a lapse of nearly nine months unexplained in the affidavit is not reasonable. Motion dismissed.

Order accordingly.

Solicitors: *Suhaimi Khor Zulkifli & Chang*; *Lee Perara & Tan*; *Jackson & Masacorale*; *Fernandez & Co*; *Nashir Johal & Co*; *CL Sequerah & Co.*

Reported by *Prof Ahmad Ibrahim*

Malaysian Bar v Tan Sri Dato Abdul Hamid bin Omar (No 2)

SUPREME COURT (KUALA LUMPUR) – CIVIL APPLICATION NO 08-21-89
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF AND GUNN CHIT TUAN SCJJ
28 APRIL 1989

Civil Procedure – Application for leave to institute committal proceedings – Application for order or direction to Lord President of Supreme Court to advise the Yang di-Pertuan Agung to appoint additional judges of the Supreme Court – Disqualification – Application to stay proceedings pending application to Lord President

In this application the applicant applied for an order or direction that the Lord President of the Supreme Court do advise the Yang di-Pertuan Agung to appoint such person or persons who have held high judicial office in Malaysia and whom the Yang di-Pertuan Agung in his absolute discretion thinks fit to be an additional judge or judges to hear the committal proceedings against the respondent. Alternatively, the applicant sought for an order that the committal proceedings be stayed pending an application to the Lord President for the same purpose.

Held, dismissing the application:

(1) As regards disqualification, the only objection against the judges constituting the Supreme Court would seem to be that they sat to consider the order of prohibition issued against the tribunal to inquire into the conduct of Tun Salleh Abas. The Supreme Court which sat then was only concerned with the legality or propriety of the order of prohibition. They were only concerned with questions of law and not concerned with the circumstances which brought about the committal proceedings.

(2) Under art 122(1A) of the Federal Constitution for the appointment of additional judges, the Lord President has to advise the Yang di-Pertuan Agung and he has to nominate the additional judges. This obviously will not solve the problem posed by the applicant.

(3) The directions or order as requested by the applicant would be in the nature of a mandamus and the Supreme Court being essentially an appellate and a referential court has no jurisdiction to make such an order.

(4) The Supreme Court does not have the power to order or direct the Lord President as to how he should exercise his constitutional functions under art 122(1A) of the Constitution.

(5) There is absolutely no reason for the members of the court to disqualify themselves on the ground of bias or likelihood of bias. There is therefore no reason to consider the alternative ground for stay.

Legislation referred to
Federal Constitution art 122(1A)

Raja Abdul Aziz Addruse (*S Theivanthiran*, *Lee Min Choon*, *Matthias Chang*, *Gurbachan Singh Johal*, *Collin Sequerah* and *Jeffrey Fernandez* with him) for the applicant.
Tan Sri Abu Talib bin Othman, Attorney General, Malaysia (*T Selventhiranathan*, Senior Federal Counsel, with him) for the respondent.

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): The Malaysian Bar took out a notice of motion to move the court for an order or direction that the Lord President of the Supreme Court do advise the Yang di-Pertuan Agong pursuant to art 122(1A) of the Federal Constitution to appoint such person or persons who have held high judicial office in Malaysia and whom the Yang di-Pertuan Agong in his absolute discretion deems fit to be an additional judge or judges of the Supreme Court to hear the committal proceedings against the respondent. Alternatively the Malaysian Bar sought for an order that the committal proceedings be stayed pending an application to the Lord President under the same art 122(1A) of the Federal Constitution for the same purpose.